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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1528

DIANA KEARNY POWELL,
Petitioner

v.

COMMITTEE ON ADMISSIONS AND GRIEVANCES,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. APP. A-2) is unreported. The opinion of the District Court, also unreported, is set out in this brief, *infra,* p. 8.

JURISDICTION

The judgment of the Court of Appeals was entered on January 12, 1967. The petition for writ of certiorari was filed on April 11, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the petitioner, a member of the Bar of the United States District Court for the District of Columbia, was properly disbarred by that Court when the record disclosed that in a pleading signed, verified and filed by her in the District Court she alleged that a judge of the District Court and a judge of the United States Court of Appeals for the District of Columbia Circuit were guilty of fraud, corruption and deliberate perversion of justice in performing their judicial duties, and when she repeatedly reiterated these allegations, which the District Court found were false and scandalous and were made by the petitioner without justification or foundation in fact.

STATEMENT

After a hearing at which the petitioner appeared pro se, the United States District Court for the District of Columbia[1] entered an order disbarring the petitioner for professional misconduct and conduct prejudicial to the administration of justice. (JA 10)[2] The order was entered pursuant to the provisions of D. C. Code (1961) Sec. 11-2102, as amended, 77 Stat. 504[3].

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[1] Judges Keech, Youngdahl and Walsh.

[2] "JA" refers to the "Joint Appendix" filed by the petitioner in the Court of Appeals, which she has made a part of the record before this Court.

[3] Sec. 11-2102 provides in part:

> "The United States District Court for the District of Columbia may censure, suspend from practice, or expel a member of its bar for crime, misdemeanor, fraud, deceit, malpractice, professional misconduct, or conduct prejudicial to the administration of justice. * * *"

The petitioner was tried in the District Court upon charges preferred by the Committee on Admissions and Grievances of that Court, alleging:

> "1. That the respondent, Diana Kearny Powell, is a member of the bar of the United States District Court for the District of Columbia, having been admitted to practice on October 15, 1940.
>
> "2. That on or about January 26, 1965, the respondent signed, verified and filed in the United States District Court for the District of Columbia, a complaint in an action entitled *Diana Kearny Powell* v. *Nicholas Katzenbach, Acting United States Attorney General,* Civil Action No. 207-65.
>
> "3. That in the aforesaid complaint the respondent stated as follows:
>
> 'The Honorable Judge Alexander Holtzoff, on or about the 20th day of September, 1960, while sitting as judge in the United States District Court for the District of Columbia, knowingly and deliberately misstated and perverted the facts and law in rendering an oral decision in Civil Action No. 4051-55, knowing that in violation of his duty and oath as a judge he was perverting justice to aid the fraud and violation of the criminal law of the United States described in paragraph Two hereof, and refused to reconsider or correct the misstatement and perversion of the facts and law, then or in subsequent proceedings, and further,
>
> 'The Honorable Judge Warren Earl Burger, on or about the thirty-first day of July, 1960, in rendering a decision in the appeal from the decision of Judge Holtzoff described in paragraph Three hereof, Appeal No. 16,071, in the United States Court of Appeals for the District

of Columbia Circuit, knowingly and deliberately misstated both the facts of record and the law in order to give color of legality to the affirmation of the spurious decision of Judge Alexander Holtzoff, using the office of judge to pervert justice and aid and abet fraud and the commission of crime against the United States criminal code perpetrated by the National Savings and Trust Company, its Attorney, Henry H. Paige, and Benjamin W. Dulany, in violation of 18 U.S.C. 645, 656, 1005, by deliberately falsifying the facts of record and the case law corruptly to obstruct and impede the due administration of justice, and thereafter refused to reconsider or correct the misstatement and perversion of fact and law when these were brought to his attention in subsequent proceedings.

'Plaintiff has exhausted every civil remedy, and because of the wealth and high office of the persons involved, cannot obtain effective criminal action through usual channels.

'WHEREFORE, Plaintiff respectfully prays this Honorable Court to issue process in the nature of a Writ of Mandamus to Nicholas Katzenbach, Acting Attorney General, or to the United States Attorney General, if appointed, to proceed with duties imposed under 5 U.S.C. 291 as amended, Sec. 311a, to prosecute violations of Title 18, U.S.C., including Secs. 645, 656, 1005, by a national bank or its agents, or by an officer of the United States, as hereinbefore described.'

"4. That the allegations of misconduct, fraud and corruption, made against Judge Alexander Holtzoff and Judge Warren Earl Burger in the aforesaid complaint and set out above, were false and scandalous and were made by the respondent without justification or foundation in fact.

> "5. Upon the facts herein set forth, the Committee on Admissions and Grievances of the United States District Court for the District of Columbia believes and avers that the respondent, Diana Kearny Powell, has been guilty of professional misconduct and conduct prejudicial to the administration of justice." (Appellant's Supp. App. P. A-1)

In her answer[4] to the charges preferred by the Committee the petitioner admitted that she had signed, verified and filed the complaint containing the quoted accusations against Judge Holtzoff and Judge Burger. However, she stated:

> "Respondent denies the allegations of paragraphs 4 and 5. She respectfully shows that the complaints which she made of misconduct, fraud and corruption do not constitute misconduct on her part which would subject her to suspension or disbarment from further practice of the law before the Bar of this Court because (a) they are proper statements of facts made in a pleading, using only the language necessary to describe the matters complained of; (b) they were addressed to the proper authority, that is, Nicholas Katzenbach, the Attorney General of the United States; (c) the matters complained of were true facts, patent in the records of this Court, the truth of which had been brought to the attention of the Committee on Admissions and Grievances; (d) the respondent acted in accordance with the highest standards of professional duty and ethics, as set forth in Canon 1 of the Canons of Professional Ethics, and for the purpose of protecting the public, the Court, and the profession from flagrant abuse."

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[4] The answer is in the record before this Court.

At trial the petitioner in her opening statement summarized the theory and grounds of her defense as follows:

> "May it please the Court: In rebuttal of the charges which are made of unprofessional conduct, I expect to show that the charges made are founded in fact; that the facts, the true facts, herein, in this case, are in the record; that that record was before the Judges in question; and that in the course of the proceedings, notwithstanding the fact that it was before them, they misquoted the record and based their opinion upon misrepresentations which were patently false; and therefore that the statements made in the complaint which was addressed to a proper party, that is, the Attorney General of the United States —a matter that was within his jurisdiction—were true and did have a foundation in fact." (Tr. pp. 5, 6)

The petitioner reiterated this statement of her position during the course of the hearing. Thus, at page 17 in the transcript the following colloquy took place between Judge Keech, who was presiding, and the petitioner:

> "JUDGE KEECH: Miss Powell, let me say this to you: It is your position in this matter on the face of the record—on the face of the record—that Judge Holtzoff and Judge Burger had facts before them, that they deliberately or with reckless abandon refused to make use of them, and therefore they are guilty of fraudulent acts.
>
> "MISS POWELL: That is essentially the position which I take."

Again, at page 30:

> "JUDGE KEECH: * * * we assume, you are going to argue that the records on their face

clearly show that what was done was deliberately done with utter disregard of the facts in the case. And we are going to determine this matter on the record as it was before the Courts at that time.

"MISS POWELL: Yes, Your Honor. That is what I am asking to be done.

"JUDGE KEECH: Well, what we are saying to you is that the records speak for themselves. They have already been stipulated into the record." (Tr. p. 30)

At page 56 of the transcript Judge Keech stated:

"* * * you are saying to this Court that the record as it stands is so patently erroneous that your charges are justified. Therefore, you do not need to go beyond the four corners of the record.

"That is your position, is it not?"

The petitioner responded:

"That is my position, Your Honor."

Counsel for the Committee stipulated at trial that all of the official records upon which the petitioner relied were before Judge Holtzoff and Judge Burger when they took the actions of which the petitioner complained and that such records might be considered by the District Court. (Tr. pp. 17, 26, 30)

The Committee called as witnesses Judge Holtzoff, Judge Burger, Judge Prettyman and Judge Miller. (Judge Prettyman and Judge Miller had participated with Judge Burger in the decision in *Powell* v. *National Savings and Trust Company*,[5] the matter with respect

[5] Powell v. National Savings and Trust Company, 111 U.S. App. D.C. 290, 296 F. 2d 412, cert. den. 368 U.S. 946 (1961), rehearing denied, 368 U.S. 1005 (1962).

to which the Petitioner alleged that Judge Burger had acted corruptly. Judge Burger wrote the majority opinion, Judge Prettyman dissented). All of the judges testified categorically that the petitioner's allegations of fraud and corruption were completely without foundation. (Judge Holtzoff, Tr. pp. 10, 11; Judge Burger, Tr. p. 21; Judge Prettyman, Tr. p. 43; Judge Miller, Tr. p. 53)

At the conclusion of the trial the District Court allowed the petitioner two weeks within which to file a brief in her behalf. (Tr. p. 80) She submitted an elaborate brief, which she has filed with this Court as "Appellant's Supplemental Appendix (Brief in U. S. District Court)." The petitioner stated that this was a "brief setting forth the matters of record and argument upon which Respondent relies for her defense." (Brief, pp. 2, 3) Included in the brief, as "Appendix B to Respondent's Brief" was an "ANALYSIS OF PATENT MISREPRESENTATIONS of the record, facts, and the case law in opinions of Judge Holtzoff and Judge Burger about which there could be no bona fide question or mistake, prepared by Diana Kearny Powell."

Thereafter the District Court filed the following memorandum:[6]

> "The Committee on Admissions and Grievances of the United States District Court for the District of Columbia has filed a complaint charging Diana Kearny Powell, a member of the bar of that Court with unprofessional conduct and conduct prejudicial to the administration of justice.
>
> "The conduct in question consists, in essence, of charges by the respondent that Warren E.

[6] The memorandum is in the record before this Court.

Burger, a Judge of the United States Court of Appeals for the District of Columbia Circuit, and Alexander Holtzoff, a Judge of the United States District Court for the District of Columbia, did knowingly and deliberately misstate or pervert the facts and law to aid and abet a fraud in violation of the criminal law.

"This matter came on for hearing on January 18, 1966, before Judges Keech, Youngdahl and Walsh. Roger Robb, Esq., and Francis W. Hill, Jr., Esq., appeared as attorneys for the Committee, and respondent appeared pro se. Before, and at, said hearing the Court accorded respondent an opportunity to get counsel. It was deemed advisable that she do so, inasmuch as the action from which these charges originated related to property in which respondent was personally interested.

"Upon the evidence adduced at the hearing and the briefs submitted by the parties, the Court finds that the charges respondent admittedly made against the aforesaid Judges are without foundation and completely false, and constitute professional misconduct of the highest magnitude and conduct clearly prejudicial to the administration of justice. The Court is therefore constrained to find the respondent guilty as charged.

"The Court will allow the respondent ten days within which to file such memorandum as she may be advised to file, setting forth any matters (not now of record) which she may deem to be in mitigation of the conduct aforesaid. Counsel for the Committee, if so advised, may reply thereto within five days."

The petitioner did not avail herself of the opportunity, afforded by the Court, to submit matters in mitigation of her conduct. Instead, she filed a motion

to set aside the finding of guilty and to enter a judgment of not guilty. (JA 1-3) Among the grounds of her motion were the following:

> "Respondent's Brief (B 1-6) conclusively shows by detailed cross-reference between the false statements and the facts of record and the cases cited that Judge Holtzoff aided fraud by the former trustee by misstatements of the will of Diana Kearny Powell in 8 particulars, of the record and evidence in Civil Action 4051-55 and the Administration 12,657 in 6 particulars, misstated the case law, and condoned patent fraud in at least 7 particulars.
>
> "Respondent's Brief (B 6-20) conclusively shows by detailed cross-reference between the false statements and the facts of record and the cases cited that Judge Burger aided fraud by the former trustee by misstatements of the will of Diana Kearny Powell in approximately 35 particulars, of the record and evidence in approximately 40 particulars, and of the case law in approximately 21 particulars.
>
> * * *
>
> "Respondent alleges prejudicial error that the case had been decided on the basis of her appearance *pro se,* and not on the evidence, and further alleges that the Court has arbitrarily excluded all evidence, although relevant, pertinent, and admitted, from its consideration solely because introduced by her *pro se,* and in support of her defense. * * *"

The Court denied the petitioner's motion to set aside the finding of guilty and to enter a judgment of not guilty. (JA 7, 8) In separate findings of fact the Court found: "the allegations of misconduct, fraud and corruption, made against Judge Alexander Holtzoff and Judge Warren Earl Burger * * * were

false and scandalous and were made by the respondent without justification or foundation in fact." (JA 10) The Court concluded as a matter of law that the petitioner was "guilty of professional misconduct of the highest magnitude and conduct clearly prejudicial to the administration of justice." (JA 8-10) The Court ordered that the petitioner be disbarred. (JA 10, 11)

In a per curiam opinion (Pet.'s App. A-2) the Court of Appeals found that the record supported the finding and conclusion of the District Court, and the order of disbarment was accordingly affirmed.

ARGUMENT

I.

The disbarment of the petitioner was proper. The petitioner repeatedly charged that in their official actions, a judge of the United States Court of Appeals and a judge of the District Court were guilty of fraud, corruption and deliberate perversion of justice. Although given an opportunity to do so the petitioner failed to present any evidence in support of these allegations, and the District Court properly found that they were false and scandalous and were made by the petitioner without justification or foundation in fact. The case therefore falls squarely within the rule of *Duke* v. *Committee on Grievances,* 65 App. D. C. 284, 82 F.2d 890, cert. den. 298 U.S. 662 (1936). Certainly it cannot be that the right of free speech, which the petitioner invokes, protects a member of the bar who makes such false, scandalous and reckless charges against judges. The disbarment of an attorney is of course a matter within the sound discretion of the court. *Ex parte Burr,* 9 Wheaton 529 (1824); *Ex*

parte Secombe, 19 How. 9 (1857); see *Carver* v. *Clephane,* 78 U.S. App. D.C. 91, 137 F.2d (1943).

The petitioner has all times insisted that the truth of her allegations against the two judges is demonstrated by the official records which were before them when they made the decisions about which she complains. In other words, she rests her defense entirely upon the conclusions she draws from the records. It was stipulated at trial that all of the pertinent records were before Judge Holtzoff and Judge Burger and might be considered by the District Court and used by the petitioner in her effort to justify her charges. She did in fact use the records, and filed a voluminous "ANALYSIS OF PATENT MISREPRESENTATIONS of the record, facts and the case law in opinions of Judge Holtzoff and Judge Burger about which there could be no bona fide question or mistake * * *" (App. B to Respondent's Brief before the District Court) There is not the slightest basis for the suggestion now made by the petitioner that the records were not considered by the District Court.

The District Court accorded the petitioner an opportunity to obtain counsel, but she declined to do so. Having found her guilty, the Court allowed her ten days within which to file a memorandum setting forth matters in mitigation of her conduct. See opinion of District Court *supra* p. 8, 9. She did not avail herself of this opportunity, but instead filed a motion in which she reiterated her scandalous attacks on Judge Holtzoff and Judge Burger. The petitioner's claim that the conduct of the District Court was arbitrary and constituted an attempt "to induce by duress suppression of the facts" is as false and reckless as her charges against Judge Holtzoff and Judge Burger. The Court

treated her with utmost fairness and compassion. The record does not even suggest any matter or question requiring consideration by this Court by way of certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

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